

## ***8 Official Opinions of the Compliance Board 46 (2012)***

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March 29, 2012

**Re: Maryland Transportation Authority (Craig O'Donnell, Complainant)**

We have considered the complaint of Craig O'Donnell ("Complainant"), of the Kent County News, that the Maryland Transportation Authority ("Authority") violated the Open Meetings Act (the "Act") with respect to a closed meeting it held on September 26, 2011. We have also considered the Authority's response.

We conclude that the Authority violated the Act by closing the meeting to the public without first voting in public to do so, without first creating a written statement of the basis of the decision to exclude the public, and without

adequately summarizing the meeting in the minutes of its subsequent meeting.

In this opinion, we emphasize that, contrary to the Authority's position, a public body may not vote in secret to meet in secret. A vote to hold a closed session must instead be conducted in a meeting open to the public. We also address the Complainant's other allegations, some of which illustrate the principle that a public entity invites suspicion when it bypasses the statutory procedures for closing a meeting to the public. Here, the session reported in the Authority's closed-session minutes in fact fell within the exception the Authority had cited as authority for the closing.

Other allegations raise topics beyond our authority. We again stress that allegations that a public body has failed to send a person copies of meeting minutes and closing statements do not state violations of the Act.

Finally, we correct the Authority's stated belief that we decided the status of its Human Resources Committee in an earlier opinion.

### **Facts**

We begin with the facts pertinent to Complainant's allegations that the Authority did not give proper notice of the September 26, 2011 meeting, did not hold a vote in open session to convene in a closed session, and did not timely prepare a written statement of the basis of the decision to exclude the public ("closing statement").

On September 26, 2011, the Authority posted the following notice on its website:

#### **FOR IMMEDIATE RELEASE**

September 26, 2011

On September 26, 2011, the Maryland Transportation Authority Board will hold a special meeting at 12:30 regarding a personnel matter. The teleconference meeting will be conducted from 2310 Broening Highway, Suite 160, and is closed to the public.

The Authority states that it posted the notice "a few hours before the meeting occurred," and that the meeting had in fact been scheduled "only hours before it took place." The minutes of that session refer to it as a "Closed Session" and describe it as a "Special Meeting," held "via

teleconference.” The Authority states that the members “voted to go into closed session and made a written statement during the meeting,” and that the written closing statement “was executed at the time of the . . . closed session.”

The Authority provided us with the closing statement it made during the meeting. As Complainant has alleged that the Authority’s entries on that three-page form document were deficient, we describe it in detail. The entries are partially typed and partially handwritten. The typewritten entries on the first page state the “Date” as “September [\*\*] , 2011,” (thus without an entry for the day), the “Location” as “7201 Corporate Center Drive, Hanover, MD 21076,” (thus at a different location than that posted in the notice), and the “Time” as 12:35. The form contains a checklist of the fourteen reasons for which a public body may close a session; a typed “X” appears next to the reasons pertaining to discussions of “the appointment, employment, [or] assignment ... of appointees, employees or officials over which [the public body] has jurisdiction ....” The handwritten entries identify the members who made, seconded, and voted to adopt the motion to close. The second page contains a typewritten entry under the heading “Topics to be discussed”; it states that the meeting “will be closed ... to permit the Authority to discuss the appointment of an individual to the position of MDTA Executive Secretary.” The third page contains the form statement that the “reason for closing” was the discussion of “matters that are permitted by statute to be discussed during a closed session of a public body” and the signature of the “presiding officer.”

### Discussion

#### *A. Whether the Authority complied with the procedures for closing a meeting to the public*

We turn first to the related questions of whether a public body that wishes to meet in a closed session must first vote to do so in an open session and must first create a closing statement. The Authority states that it “does not interpret the plain language of the statute to require that an open session must be held prior to a public body voting to hold a closed session.” The Authority thus claims that a public body may meet in a closed session and conduct the vote during that closed session. The Authority further asserts that it complied with the Act by creating its written statement during the closed session.

Neither the Act, codified at Annotated Code of Maryland, State Government Article (“SG”), §§ 10-501 *et seq.*, nor the *Open Meetings Act Manual*, issued by the Office of the Attorney General (2010), supports the

Authority's interpretation, and we have long made clear in our own opinions that the vote to close a meeting must be held in an open meeting. We explain.

SG § 10-505 states the Act's fundamental requirement that, "[e]xcept as otherwise expressly provided in this subtitle, a public body shall meet in open session." As relevant here, the exceptions expressly provided by the Act appear in SG § 10-508(a), which lists fourteen topics which a public body may discuss in closed session. Subsection (a) is explicitly "[s]ubject to the provisions of subsection (d)," which sets forth the procedures a public body must follow in order to claim an exception. First, subsection (d) expressly forbids the holding of a closed session unless the members of the body have voted to do so:

- (1) Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body may not meet in closed session.

Then, subsection (d) makes clear that both the vote and the creation of a written closing statement must precede the closed session:

- (2) **Before a public body meets in closed session, the presiding officer shall:**

- (i) **conduct a recorded vote on the closing of the session; and**
  - (ii) **make a written statement of the reason for closing the meeting,** including a citation of the authority under this section, and a listing of the topics to be discussed.

- (3) If a person objects to the closing of a session, the public body shall send a copy of the written statement required under paragraph (2) of this subsection to the Board.

*Id.* (emphasis added); *see also Suburban Hospital v. Maryland Health Resources Planning Commission*, 125 Md. App. 579, 589 (1999) (stating the duties to be performed by the presiding officer "[b]efore a public body meets in a closed session ...."), *vacated as moot*, 364 Md. 353 (2001).

The vote to close a session must be held in an open session "to ensure that those who participate in a closed session are accountable for the decision to close." 3 *OMCB Opinions* 4, 6 (2000). The closing statement must be completed before the public body closes its meeting because:

the Act grants a member of the public the right to object to the closure. While an objection does not preclude a closed session, the public body must send a copy to the Compliance Board. § 10-508(d)(3). If the form were permitted to be completed after the start of the closed session, the public body would effectively eliminate the public's right to evaluate, then and there, the asserted basis for the public body's decision to close its meeting.

5 *OMCB Opinions* 105, 109 (2007). A publicly-held vote will be reflected in the minutes of that meeting, and, under SG § 10-508(d)(4), the closing statement is a matter of public record. The Act is violated "if ... the [closing statement] is modified during the course of the closed session and the presiding officer signs the form at the session's end...." *Id.* at 109. And, while "nothing in the Act ... preclude[s] advance staff work to ready a [closing] form for the presiding officer's use[,] the form must "accurately [reflect] the justification at the time a meeting is closed...." *Id.*

We have frequently "note[d] that the public body is ultimately responsible for compliance, not the staff." *Id.*, citing 3 *OMCB Opinions* 164, 167 (2001); *see also, e.g.,* 7 *OMCB Opinions* 226, 226-27 (2011) ("Neither the presiding officer's duty to make the closing statement nor the members' duty to confine their closed-session discussions to the listed topics may be delegated to staff."). The Act does not make the presiding officer's performance of his or her duties contingent on public attendance at the meeting. Instead, the Act's documentation requirements evidence the Legislature's intent that a public body's conduct of public business be transparent also to members of the public who are unable to attend its meetings.

The Authority violated the Act by voting to close its session in a closed session. The Authority's statement here of its contrary "interpretation" of SG § 10-508 raises the possibility that the Authority may have bypassed the SG § 10-508(d) procedures in other instances.<sup>1</sup> We urge the Authority to comply with those procedures and also to view them as an easy way of assuring the public that a meeting has been legally closed. We also urge the Authority's presiding officer to ensure that any closing statements prepared in advance remain accurate and complete at the time of the vote.

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<sup>1</sup>It appears from the agenda of the Authority's January 23, 2012, monthly meeting that the Authority also began that meeting with a closed session.

*B. Whether the Authority gave adequate notice of the meeting*

When a public body meets to perform a function within the Act, it must give “reasonable advance notice” of the meeting. SG § 10-506(a). Complainant states that the Authority violated its bylaws by holding a meeting on less than 24 hours’ notice; that the Authority should have published its hastily-scheduled meeting by notice to the press and not merely by a posting on the Authority’s website; and that the notice violated the Act because it stated that the entire meeting would be closed to the public.

The first two allegations question the timeliness and method of giving notice of a meeting scheduled on short notice. We have often reviewed the applicable principles. *See, e.g.* 7 *OMCB Opinions* 237, 238-240 (2011), 1 *OMCB Opinions* 38, 39 (1993) and 1 *OMCB Opinions* 183, 188-89 (1996). Boiled down, they are:

- 1) the Act “is not intended as a barrier to a public body’s holding of meetings on short notice, if that timing is needed to deal with urgent public issues,” *id.* at 189;
- 2) we do not second-guess a public body’s decision that it needs to meet on short notice unless it appears that the public body has intentionally delayed giving notice of a meeting it knows it will hold, *see id.*;
- 3) when the public body must meet on short notice, it must provide “the best public notice feasible under the circumstances,” 7 *OMCB Opinions* 238; and
- 4) “if events require the prompt convening of a previously unscheduled meeting, the public body would be well-advised to provide telephone notice to reporters who are reasonably thought to be interested....” 1 *OMCB Opinions* 39 (quoting *Open Meeting Act Manual* 15 (1992)).

From the background information provided by Complainant, it appears that events beyond the Authority’s control caused the Authority to perceive an urgent need to discuss the appointment of its executive secretary, and we will not second-guess that decision. As for best feasible notice, we repeat, a public body “would be well advised to provide telephone notice to reporters who are reasonably thought to be interested....” Complainant falls easily into this category; as the Authority is aware, he has followed the Authority’s meetings

since at least 2009. *See 7 OMCB Opinions* 30 (2010). Some public bodies maintain a list of the e-mail addresses of people who wish to be notified their meetings, *see, e.g., 7 OMCB Opinions* 259, 262 (2011), and we commend such bulk e-mails as an additional method of giving notice.

We turn to the adequacy of the Authority's notice. Under SG § 10-506(b), that notice "shall ... include the date, time and place of the session ... and, if appropriate ... a statement that a part or all of a meeting may be conducted in closed session."<sup>2</sup> If the Authority did not in fact convene this Meeting at its Broening Highway offices – the closing statement places the meeting at "Corporate Center Drive, Hanover, MD" – the notice violated the Act. The Authority amply disclosed here that it would go into closed session; the problem was that it was required to first hold an open session and did not. A public body should give notice of both the open session and any closed session it expects to hold. *See, e.g., 3 OMCB Opinions* 197-99 (2002) (discussing notice practices).<sup>3</sup> And, a public body which posts its meeting notices online may avoid an accusation, such as the one asserted here, that the posting was belated by simply adding the posting date to the notice.

*C. Whether minutes and other meeting documents were produced in a timely fashion*

Many of Complainant's allegations concerning the failure of the Authority to send him the minutes of the September 26 meeting stem from his assumption that the Authority would have met in public to close the session and would have publicly generated a closing statement and open-session minutes. As set forth above, the Authority was required to create a closing statement. Under the Act, that document should have been available immediately for inspection at the Authority's offices. We do not know whether the Authority would have provided Complainant with the closing statement had he appeared at the Authority's offices.

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<sup>2</sup>SG § 10-506, taken by itself, might suggest that a public body may meet entirely in closed session. As we have explained, however, SG § 10-508 governs the closing of a session under the fourteen exceptions provided there, and it requires the presiding officer to follow certain procedures "before the public body meets in closed session...." SG § 10-508(d).

<sup>3</sup>We note from the Authority's website that, in conformance with SG § 10-506, it has usually informed the public that part of a meeting might be closed.

We reiterate (*see 7 OMCB Opinions 30, 34 and 64, 66 (2010)*) that the Act does not require electronic transmission of minutes or the provision of copies and that we do not address Public Information Act (“PIA”) issues. A complaint that a public body has not transmitted minutes thus does not state a violation of the Act. Likewise, a public body’s delay in responding to a PIA request for minutes does not prove that the public body was dilatory in adopting them, and so such allegations are not relevant to our consideration of that question.

*D. Whether the claimed exception applied*

The Authority has provided us with the sealed minutes of its closed session. The discussion fell within the exception provided by SG § 10-508(a)(1) for the discussion of “the appointment . . . of appointees, employees, or officials over whom [the public body] has jurisdiction . . .” The exceptions in subsection (a), however, are “subject to” the procedures set forth in subsection (d). Had the Authority followed those procedures, the exception would have applied.

*E. Whether the summary of the closed session was adequate*

SG § 10-509(c)(2) provides:

If a public body meets in closed session, the minutes for its next open session shall include:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under this subtitle for closing the session;
- and
- (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

The minutes of the Authority’s October 27, 2011 meeting include this information:

**RATIFICATION OF ACTION TAKEN DURING SEPTEMBER 26,  
2011 CLOSED SESSION MEETING**

Upon motion by Ms. Halsey and seconded by Mr. Woodford, Members unanimously approved the appointment of Harold M. Bartlett as the MDTA Executive Secretary.



In short, the minutes state the action taken and the date of the closed session but none of the other information required by SG § 10-509(c). As the Authority acknowledges in its response, they do not comply with the Act.

*F. Whether we in fact decided in 7 OMCB Opinions 176 (2011) that the Human Resources Committee was not a public body*

In response to Complainant's statement that the Authority's Human Resources Committee may have met to consider the appointment of the executive secretary, the Authority states that "the [Open Meetings Compliance Board] previously addressed [Complainant's] concerns with respect to the Human Resources Committee in its May 23, 2011 opinion." The Authority further "states that there have not been any changes to the Human Resources Committee since that time, and, as such, the Human Resources Committee is not a 'public body' by definition and is not subject to the Act." We have no information that the committee held a meeting on the subject of the Authority's executive secretary and address the allegation only to correct the Authority's statement.

We issued 7 OMCB Opinions 176 (2011) on May 23, 2011. There we made clear that we could not reach any conclusion on the status of the Human Resources Committee:

While the documents evidence the creation of a Human Resources Committee, we have no information on how it was created and whether the Authority has adopted a resolution analogous to that adopted for the Capital committee. We also lack information on the creation of the Authority's other committees and groups.

*Id.* at 185.

We then gave direction which we find necessary to repeat here:

In case any of these committees fall within the definition of a public body under the Act, we counsel that the Act's procedures apply even when a committee has been created to handle matters for which meetings may properly be closed.

*Id.* In short, we do not know whether the Human Resources Committee is a public body, and we once again encourage the Authority to make that determination from its own records and proceed accordingly.

### **Conclusion**

This matter is a classic example of how a public body might avoid needless suspicion, and also the expenditure of its resources on responding to a complaint to us, by adhering to the Act's procedures for meeting in closed session. Holding a vote to close a session in a closed session leaves the interested public in the dark on the very information that the Act requires the public body to disclose, such as which members of the public body met and why they excluded the public. The procedures in the Act provide public bodies with an efficient mechanism for recording and producing this information in documents available to the public. We urge the Authority to comply with those procedures; it did not do so here.

Open Meetings Compliance Board

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